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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RONALD WASON MIGUEL, Defendant and Appellant.	H034069 (Santa Clara County Super.Ct.No. CC898896)

A jury found Ronald Wason Miguel guilty of sexual assaults on an eight-year-old girl. On appeal, he claims that the trial court failed to instruct the jury properly on the elements of one of the crimes and that it incorrectly ruled that he waived his rights to remain silent and to have counsel present in the face of police interrogation.

We will affirm the judgment.

PROCEDURAL BACKGROUND

The jury convicted defendant of 23 counts of sexual acts by an individual age 18 or older on a child age 10 or younger. These included 10 counts of sexual intercourse or sodomy (Pen. Code, § 288.7, subd. (a))[1] and 13 counts of oral copulation or sexual penetration (*id.*, subd. (b)). The trial court sentenced defendant to 445 years to life imprisonment in state prison.

[1] All further statutory references are to the Penal Code.

FACTS

I. *Prosecution Case*

In March of 2008 eight-year-old J. D. told her mother that defendant had been touching her on her rectum. J. D. also said that defendant had "kissed" her "down there," indicating her vaginal area. Defendant admitted to J. D.'s mother that he had touched J. D.'s rectum.

After this revelation, J. D.'s mother left defendant, who was her live-in boyfriend, and moved J. D. and the mother's other children into a homeless shelter and a domestic violence center. Later she moved to her own mother's residence.

J. D. testified as follows:

J. D. was about six or seven years old when defendant began to sexually abuse her. At times she would yell for her mother, but she would be asleep and not come to her aid.

Defendant would penetrate J. D.' s vagina and anus with his penis. He would pull down her pants and insert his penis in both orifices. His penis was not erect on these occasions and he would use a lubricant. He committed the vaginal penetrations "A lot of times," specifically about 50, and the anal penetrations more than 10 times. These acts caused J. D. pain and she would notice bleeding afterward.

Defendant would use his hands to touch J. D. on her external genitalia and rectum, either under or over J. D.'s clothing. He did this "A lot."

Approximately twice, defendant inserted a finger or fingers into J. D.'s vagina.

Defendant would use his mouth to contact J. D.' s external genitalia and rectum. J. D. thought that this occurred 12 times.

Once or twice, defendant tried to force J. D. to orally copulate him. He grabbed her leg while she was climbing the stairs in the house and toppled her. He took the back of J. D.'s head and forced her mouth onto his penis, trying to insert it.

Defendant would grab J. D.'s wrist and make her rub his penis. He did this "A lot of times."

A police officer testified that J. D. gave him similar information when he interviewed her. The police videotaped a second interview, in which J. D. provided details also consistent with her testimony, and the jury watched the recording. In addition, J. D. had testified at the preliminary examination and the jury heard her testimony. J. D.'s extrajudicial and preliminary examination statements were largely consistent with her testimony in court. Some estimates of the number of assaults varied from her in-court testimony, however. She estimated the number of acts of intercourse at 30 to 50, sodomy at 50, oral copulations by him of her at 50, by her of him at one, of vaginal penetrations with fingers at three, and the total number of sexual assaults at 200.

The police videotaped an interview with defendant in which he admitted sexually abusing J. D. but denied any acts of sexual intercourse, sodomy, or sexual penetration with his fingers. The jury watched the recording.

II. *Defense Case*

Defendant presented no defense case. Of course, through the taped interview of him that the jury heard, he was able to suggest to the jury that he committed much less sexual abuse than J. D. described in and out of court.

DISCUSSION

I. *Instructions on Sexual Intercourse and Sexual Penetration*

Defendant claims that, with regard to counts 1, 3, 4, 5, and 6, i.e., the charges on which the jury was instructed to consider the sexual intercourse evidence against him, the trial court erred under state law by failing to instruct, sua sponte, in a clear manner on the elements of section 288.7, subdivision (a), i.e., the law giving rise to the accusations that he unlawfully engaged in sexual intercourse with J. D. Specifically, defendant contends that the court was required to define sexual intercourse as penetration of a vagina with a penis and failed to do so, and failed to distinguish sexual intercourse from other forms of sexual penetration.

The People argue that defendant forfeited this claim because it amounts to an assertion that an instruction legally correct in principle nevertheless should have been clarified or amplified. (See *People v. Rogers* (2009) 46 Cal.4th 1136, 1162, fn. 14.) We do not believe that the procedural bar should be imposed here, however.[2] The law of forfeiture is more forgiving when the giving of a key instruction is at issue. (§§ 1259, 1469.) The Supreme Court has reiterated that in most cases "an appellate court may review a forfeited claim—and '[w]hether or not it should do so is entrusted to its discretion.' " (*In re Sheena K.* (2007) 40 Cal.4th 875, 887, fn. 7; cf. *id*., p. 888, fn. 7, 3d par. [appellate courts lack discretion to review otherwise forfeited claims regarding the admission or exclusion of evidence].) The People's forfeiture argument is not without significance, but because the forfeiture question is " 'close and difficult' " (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1007, fn. 8) we will exercise our discretion to address defendant's claim on the merits.

With regard to counts 1, 3, 4, 5, and 6, the trial court provided the jury with CALJIC No. 10.59.5. We quote[3] the instruction in pertinent part: "Any person 18 years of age or older who engages in sexual intercourse with a child who is 10 years of age or younger is guilty of a violation of Penal Code section 288.7, subdivision (a), a crime.

[2] For that reason, we need not address defendant's claim of ineffective assistance of counsel. That claim is predicated on our possible conclusion that counsel was required to object to the instruction to preserve his claim. Because we conclude that the claim is reviewable on the merits, the necessary predicate does not exist.

[3] We quote the written version of the instruction. The trial court stated that it would give the jury copies of the written instructions for use during deliberations and the record offers no reason to doubt that it did so. In these circumstances (*People v. Wilson* (2008) 44 Cal.4th 758, 802) "[t]o the extent a discrepancy exists between the written and oral versions of jury instructions, the written instructions provided to the jury will control." (*Id*. at p. 803; accord, *id*. at p. 804.)

[¶] Any sexual penetration, however slight, constitutes engaging in an act of sexual intercourse. Proof of ejaculation is not required."

"A defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant." (*People v. Cross* (2008) 45 Cal.4th 58, 67-68 [speaking of both state law and federal constitutional claims].)

We discern no such reasonable likelihood.

To be sure, trial courts must provide clarifying instructions when a word or phrase has a technical or legal meaning different from its commonly understood meaning. " ' "A word or phrase having a technical, legal meaning requiring clarification by the court is one that has a definition that *differs* from its nonlegal meaning." [Citations.]' " (*People v. Cross, supra*, 45 Cal.4th at p. 68.)

"Sexual intercourse," as used in CALJIC No. 10.59.5, has no such obscure meaning. Part of the question is resolved by Supreme Court decisions holding that "sexual intercourse" is commonly understood by jurors to refer to penetration of the vagina. (See *People v. Stitely* (2005) 35 Cal.4th 514, 554 [" 'sexual intercourse' has a common meaning . . . the term can only refer to vaginal penetration or intercourse"]; *People v. Holt* (1997) 15 Cal.4th 619, 676 ["sexual intercourse" is not "a technical term with various meanings"; juries understand that it requires "penetration of the victim's vaginal genitalia"].) The other part of the question is resolved elsewhere in the instructions given. Although, perhaps because the point is obvious, *Stitely* and *Holt* do not refer to the penis as the organ doing the penetrating, the jury here was instructed that "[a]ny sexual penetration, however slight, constitutes engaging in an act of sexual intercourse. Proof of ejaculation is not required." That both defined the penetration referred to in the challenged portion of the instruction as sexual intercourse and, to a reasonable likelihood, informed jurors that intercourse is accomplished with a penis. The court had no duty to define yet further "sexual intercourse" in its instructions. In sum, defendant's claim is without merit.

II. *Defendant's Waiver of His Rights to Remain Silent and to Have Counsel Present*

Defendant claims that the trial court erred in ruling that the police did not violate his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436) in questioning him and therefore permitting the jury to receive evidence concerning his interview with the police. We do not agree.

Defendant contends that the police did not obtain his express declarations that he was willing to speak with them and did not wish to be represented by counsel before or during questioning, and that any implied waiver he may have made was not knowing, voluntary, and intelligent and therefore was invalid under *Miranda*.

A police officer who was questioning defendant advised him about his *Miranda* rights as follows:

Q. "Okay, Ron. Real quick. What I'm gonna do is uh, read you your rights real quick. Okay?

"Ah, you have the right to remain silent. You understand?

A. "Yes."

Q. "Okay. Anything you say can and will be used against you in court. You understand?"

A. "Yes."

Q. "Okay. You have the right to the presence of an attorney before or during any questioning. You understand?"

A. "Yes."

Q. "If you cannot afford to hire an attorney, one will be appointed for you free of charge before any questions. You understand?"

A. "Yes, sir."

Defendant raised his points about the lack of an express waiver and the mental state that accompanied his implied waiver in a motion to exclude from evidence his extrajudicial statement on *Miranda* grounds. The interrogating officer did not obtain an express waiver from defendant that he wished to waive each of these rights and so conceded in the hearing on defendant's motion to suppress. Nevertheless, the trial court ruled against defendant after a hearing, finding a valid implied waiver. In the court's view, the interview of defendant was essentially conversational, the questioning was professional, neither the questioning nor the setting was impermissibly coercive, and defendant was lucid, able to joke at one point, and in full possession of his faculties although emotionally distraught at times. "I found nothing about that interview that doesn't comply with the idea that there was an implied waiver," the court concluded. Defendant was not "in such an emotional place that he couldn't grant that waiver."

"On review of a trial court's decision on a *Miranda* issue, we accept the trial court's determination of disputed facts if supported by substantial evidence, but we independently decide whether the challenged statements were obtained in violation of *Miranda*." (*People v. Davis* (2009) 46 Cal.4th 539, 586.)

First, defendant argues that any implied waiver was invalid. He asserts that his questioner read him his *Miranda* rights quickly and in a rote manner, that he read them a number of minutes before broaching certain key questions, that defendant was upset by the circumstances of the interview, and that the combined effect of these perceived problems was to render any implied waiver not knowing, voluntary, and intelligent, as *Miranda* requires.

"Even absent the accused's invocation of the right to remain silent, the accused's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused 'in fact knowingly and voluntarily waived [*Miranda*] rights' when making the statement. [Citation.] The waiver inquiry 'has two distinct dimensions': waiver must be 'voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception,' and 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.' " (*Berghuis v. Thompkins* (2010) __ U.S. __, __ [130 S.Ct. 2250, 2260].) Although *Miranda* stated that the government has a " 'heavy burden' to show waiver" (*id*. at p. ___ [130 S.Ct. at p. 2261]), *Berghuis* discounted this standard, observing that "this 'heavy burden' is not more than the burden to establish waiver by a preponderance of the evidence." (*Ibid*.)

Hence, in the view of *Berghuis*, "a waiver of *Miranda* rights may be implied through 'the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver.' " (*Berghuis v. Thompkins*, *supra*, ___ U.S. at p. __ [130 S.Ct. at p. 2261].) "As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford." (*Id*. at p. __ [130 S.Ct. at p. 2262].) In sum, when "the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." (*Id*. at p. __ [130 S.Ct. at p. 2262].)

We have watched the video recording of the exchange and see no reason to disturb the trial court's ruling that defendant executed a valid, if implied, waiver of his *Miranda* rights. The officer made defendant's various *Miranda* rights understandable—he was not required to intone them at an artificially slow pace—and, more to the point, defendant said that he understood them. The video recording gives us no basis not to take defendant at his word. As for defendant's assertion that the police advised him early in the interview and broached important questions only a number of minutes later, *Berghuis* also requires rejection of any notion that doing so violated *Miranda*. "The fact that Thompkins made a statement about three hours after receiving a *Miranda* warning does not overcome the fact that he engaged in a course of conduct indicating waiver. Police are not required to rewarn suspects from time to time." (*Berghuis v. Thompkins*, *supra*, at p. __ [130 S.Ct. at p. 2263].)

In sum, the prosecution met its burden of showing a valid implied waiver.

This brings us to the next question, namely whether an implied waiver of *Miranda* rights can ever suffice, i.e., whether the law requires an express waiver of one's *Miranda* rights. As noted, a police officer conceded at the hearing on defendant's motion to exclude evidence of the interview that defendant did not expressly waive his *Miranda* rights.

Defendant argued to the trial court that "[t]he question of whether or not and, if so, when an express waiver is required has divided courts, both state and federal." He urged that only an express waiver suffices to protect a criminal defendant's *Miranda* rights. In *Berghuis*, however, a decision that came after the trial herein, the United States Supreme Court resolved that question against defendant.

Berghuis held that criminal defendants must take the initiative to invoke, expressly and unambiguously, their *Miranda* rights following an advisement to them of those rights. A *Miranda* claim will fail if the suspect "makes a statement concerning the right to counsel 'that is ambiguous or equivocal' or makes no statement" (*Berghuis v. Thompkins*, *supra*, __ U.S. at p. __ [130 S.Ct. at p. 2259]), and the same rule applies to the right to remain silent (*ibid*.).

Defendant here, as was true of the defendant in *Berghuis*, "did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his ' "right to cut off questioning." ' [Citation.] Here he did neither, so he did not invoke his right to remain silent." (*Berghuis v. Thompkins*, *supra*, __ U.S. at p. __ [130 S.Ct. at p. 2260].) The same may be said of defendant's *Miranda* right to have counsel present during questioning.

As for the substance of the advisement given defendant, he conceded in his written motion before the trial court that it complied with *Miranda*'s requirements. We agree that the warning met constitutional requirements, as most recently set forth in *Berghuis v. Thompkins*, *supra*, __ U.S. __ [130 S.Ct. 2250].)[4] The United States Supreme Court recently reiterated the contours of the *Miranda* warning's requirements. "The *Miranda* Court formulated a warning that must be given to suspects before they can be subjected to custodial interrogation. The substance of the warning still must be given to suspects today. A suspect in custody must be advised as follows: [¶] 'He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.' [Citation.]" (*Id.* at p. __ [130 S.Ct. at p. 2259].) The decision leaves no doubt that the warning given to defendant sufficed with regard to its substance.

In sum, the trial court's ruling that defendant's *Miranda* rights were observed is correct and defendant's claim is without merit.

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[4] The advisement given Thompkins in the *Berghuis* case informed him:

" '1. You have the right to remain silent.

'2. Anything you say can and will be used against you in a court of law.

'3. You have a right to talk to a lawyer before answering any questions and you have the right to have a lawyer present with you while you are answering any questions.

'4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.

'5. You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned.' " (*Berghuis v. Thompkins*, *supra*, __ U.S. at p. __ [130 S.Ct. at p. 2256].)

DISPOSITION

The judgment is affirmed.

Duffy, J.

WE CONCUR:

Bamattre-Manoukian, Acting P. J.

Mihara, J.